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ABSTRACT

The administration of the various Federal financial aid programs under Title IV of the Higher Education Act of 1965 involves a complex set of legal relationships, including contracts between the institution and the Federal government and between the Federal government and other parties. This pamphlet discusses management issues surrounding these financial aid programs. It is intended to provide campus counsel with both an overview and a practical description of the structure and operation of these programs. The pamphlet begins by providing an historical background and description of the Federal Student Aid Programs. It then: (1) summarizes the significant program trends; (2) considers institutional eligibility and role in the Title IV programs; (3) reviews federal oversight of institutional participation in the Title IV Programs, including fine, limitation, suspension and termination proceedings; and (4) notes recent legislative developments (the 1992 reauthorization of the Higher Education Act); and offers recommendations for preventing legal problems through the proper management of these programs. (Contains 18 references.) (GLR)

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Managing Federal Student Financial Aid Programs

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Managing Federal Student Financial Aid Programs

Introduction

Financial aid for students constitutes the single most important source of revenue for most colleges and universities in the United States, apart from direct tuition payments by students. The administration of the various Federal financial aid programs involves a complex set of legal relationships, including contracts between the institution and the Federal government and between the Federal government and other parties. In addition, these programs are governed by detailed regulations and complex administrative procedures for awarding and disbursing student aid, for reviewing institutional compliance with applicable law and regulations, and for adjudicating issues that are not resolved through audits or other compliance reviews.

Within this complex administrative structure, the day-to-day administration of these substantial and significant programs generally is left to financial aid officers on the campus, often with little ongoing consultation with, or feedback from, counsel, chief executives or trustees. While various student financial aid audits and other reviews seek to monitor institutional performance and assess liabilities for non-compliance with applicable law and regulations, campus counsel are frequently not involved with, or even aware of, the conduct of such reviews until after important institutional interests have been determined, and sometimes compromised, by the institution taking actions that will affect subsequent liability. At the same time, because of the variety and complexity of these programs, and the often ad hoc manner in which interpretations and guidance are forthcoming from the U.S. Department of Education (or in some cases not forthcoming at all), it is difficult for any single college attorney's office to develop the scope and depth of expertise necessary to deal with these issues on an ongoing basis.

This pamphlet on Federal student financial aid has been written to address certain of the needs noted above. It is intended to provide campus counsel with both an overview and a practical description of the structure and operation of the Federal student financial aid programs in sufficient detail so that the legal issues presented can be understood with some command of the underlying subject matter. For financial aid administrators, who already know the programs in-depth, it is intended to emphasize the significant legal content—and institutional legal exposure—entailed in these programs, and to suggest the importance of early and in-depth involvement of counsel in assessing and managing the institution's legal and fiscal interests in these programs. For other campus administrators, up to and including the President and Board of Trustees, it is intended to underscore the pervasive institutional interests that are implicated by these programs, and the need for systems of early warning and intervention in responding to circumstances which, if ignored or not properly managed, could pose significant risk of harm to the institution. Such harm can

include the interruption or loss of significant institutional resources, financial exposure in the form of repayments and fines, and the public embarrassment and loss of standing often associated with such problems.

As such, this pamphlet suggests an approach involving institutional collaboration, anticipation and prevention to make the most effective use of the talents and experience of counsel and administrators alike. The results of such an approach will be the protection and advancement of the best interests of the institution.

The pamphlet begins by providing an Historical Background and Description of the Federal Student Aid Programs (Part II). It then summarizes Significant Program Trends (Part III), provides an overview of Institutional Eligibility and Role in the Title IV Programs (Part IV), analyzes in detail the Federal Oversight of Institutional Participation in the Title IV Programs (Part V), including Fine, Limitation, Suspension and Termination Proceedings (Part VI), and concludes by addressing Recent Legislative Developments (Part VII), and offering Recommendations for a Preventive Approach to managing these programs (Part VIII).

Historical Background and Description of the Federal Student Aid Programs

The greatest portion (75 per cent)[1] of all financial aid to students in higher education in the United States is provided under Federal programs created by Title IV of the Higher Education Act of 1965, as amended, known collectively as the "Title IV programs."[2] The progenitor of these programs was the post-World War II "G.I. Bill,"[3] which financed college education for returning veterans. Inspired in part by national concern over the Soviet launch of the Sputnik satellite, in 1958 Congress enacted the National Defense Education Act,[4] the first comprehensive Federal loan program for college students, which was intended to "correct as rapidly as possible the existing imbalances in our educational programs which have led to an insufficient proportion of our population educated in science, mathematics and modern foreign languages and trained in technology."[5]

Building on this foundation and the recognition in the early 1960's that financing the cost of higher education was an increasing social and political concern, and buoyed by the ambition and optimism of President Johnson's "Great Society," Congress enacted the Higher Education Act of 1965, which contained the first comprehensive program of Federal student financial assistance. The broad social proposition of the Higher Education Act was that, henceforth, attending college would not be considered a

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1. *See* H.R. Rep. No. 447, 102nd Cong., 2d Sess. 8 (1992).

2. 20 U.S.C. §§ 1070-1099 (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 461-498, 1992 U.S.C.C.A.N. (106 Stat.) 448, 479-652.

3. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. The G.I. Bill "put millions of World War II veterans into college classrooms and made them the best educated, and most productive, workers America has ever had." "Slow But Sure on National Service," *N.Y. Times*, May 5, 1993, p. A22.

4. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580.

5. *Id.* § 101.

luxury,[6] and appropriate financial aid would be available to the "poor" and the larger middle class. To achieve these ends, the Higher Education Act created programs of grant, loan and work opportunities. With considerable expansion and modification, the grant, loan and work programs of the original 1965 legislation are the backbone of today's student aid programs.

Federal Pell Grant Program

The principal grant program under Title IV is the Federal Pell Grant program[7] (formerly the Basic Educational Opportunity Grant or BEOG program). Pell Grants are available for needy undergraduate students and are usually the foundation of a student's financial aid package, to which other forms of Federal and non-Federal financial aid are added. To determine whether a student is eligible for a Pell Grant, a Congressionally established formula is used to evaluate student application data and produce an expected family contribution calculation. An individual student's Pell Grant award is then determined based on that expected contribution, the student's cost of education at the institution he or she is attending, as well as other factors, such as whether the student is enrolled on a full-time basis and whether the student is enrolled for a full academic year. The maximum Pell Grant award for the 1993–94 award year is expected to be no more than $2,300.

Federal Campus-Based Programs

The Pell Grant program is complemented by the Federal Supplemental Educational Opportunity Grant (SEOG) program[8] and the Federal Work-Study (FWS) program,[9] formerly called the College Work-Study program. Also available is the Federal Perkins Loan program,[10] formerly known as the National Direct Student Loan program, which was derived from the original National Defense Student Loan program of the 1950's.[11] The Supplemental Grant program is a grant program for undergraduate students with exceptional financial need, and currently has a maximum annual award level of $4,000. The Work-Study program funds institutionally-approved jobs for undergraduate and graduate students both on and off the campus. The Perkins Loan program provides low-interest (currently 5 percent), revolving fund loans for undergraduate and graduate students with exceptional financial need, with the school acting as lender. Beginning with the 1993–94 award year, under the Perkins Loan program a student may borrow up to $3,000 for each year of undergraduate study, with a total

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6. "So to thousands of young people, education will be available, and it is a truism that education is no longer a luxury." Comments of President Lyndon Johnson on enactment of the Higher Education Act in 1965, quoted in *The Atlanta Constitution*, January 28, 1990.

7. *See* 20 U.S.C. §§ 1070a-1070a-6 (1988 & Supp. III 1991), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 401, 1992 U.S.C.C.A.N. (106 Stat.) 448, 479-482.

8. *See* 20 U.S.C. § 1070b-1070b-3 (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 403(b), 1992 U.S.C.C.A.N. (106 Stat.) 448, 505-506.

9. *See* 42 U.S.C. §§ 2751-2756(a) (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 441-447, 1992 U.S.C.C.A.N. (106 Stat.) 448, 563-568.

10. *See* 20 U.S.C. §§ 1087aa-1087hh (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 461-468, 1992 U.S.C.C.A.N. (106 Stat.) 448, 576-585.

11. National Defense Education Act of 1958, Pub. L. No. 85-864, § 201, 72 Stat. 1580.

undergraduate limit of $15,000, and up to $5,000 for each year of graduate study, with a total limit of $30,000 (including undergraduate loans).

The Supplemental Grant, Work-Study and Perkins Loan programs are sometimes referred to collectively as the Federal "campus-based" programs. This description is used because the institution selects the recipients and calculates the awards from a pool of funds allocated to the institution by the Department of Education following a campus application process. In addition, there are institutional matching requirements for each of these programs.

The campus-based award process is in marked contrast to the Pell Grant program, under which individual student eligibility is calculated according to standard Federal formulas involving a central government-contracted Pell Grant processor. Under each of the Federal campus-based programs, however, funds are available only to the extent appropriated by Congress, and actual appropriations have never been sufficient to meet authorized funding levels.

Federal Family Educational Loan Program

The federally-guaranteed student loan program is now called the Federal Family Educational Loan (FFEL) program,[12] which was known until 1992 as the Guaranteed Student Loan (GSL) program. The three types of federally guaranteed student loans currently available are Stafford Loans (descendant of the original Guaranteed Student Loan program), Supplemental Loans for Students (SLS), and Parent Loans for Undergraduate Students (PLUS). Banks, credit unions and savings and loan associations are the primary providers of these Federal loans, all of which are guaranteed by the Federal government against the borrower's death, disability, bankruptcy and default.

Stafford Loans constitute by far the largest portion of aid under the Federal guaranteed student loan program. For many years, Stafford Loans were available only to students who could establish sufficient need but, beginning in 1992, Congress authorized Stafford Loans for students regardless of their need.[13] Interest rates for students with need-based Stafford Loans are subsidized while the student remains enrolled, on at least a half-time basis, at an eligible educational institution and during applicable deferment periods. Students with non-need-based Stafford Loans are responsible for paying the entire amount of interest themselves. Annual loan limits for periods of enrollment beginning on or after October 1, 1993 are $2,625 for first-year undergraduates, with increased amounts for succeeding years, and $8,500 for graduate students. Maximum lifetime loan amounts are $23,000 for undergraduates and $65,500 (aggregated with undergraduate loans) for graduate and professional students.

Parent Loans for Undergraduate Students (PLUS) are not need-based, interest is not subsidized by the government, and repayment begins 60

12. *See* 20 U.S.C. §§ 1071 to 1087-2, *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325 §§ 411-432, 1992 U.S.C.C.A.N. (106 Stat.) 448, 510-563.

13. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 422, 1992 U.S.C.C.A.N. (106 Stat.) 448, 535-543.

days after loan proceeds are disbursed. In effect, this loan is a consumer loan, which is the parent's obligation to repay, not the student's. Once limited to $4,000 annually, beginning July 1993, the maximum annual loan amount is the student's cost of attendance minus the total of the student's other financial assistance.

Supplemental Loans for Students (SLS) are also not need-based, but are available to independent students (those students generally responsible for their own financial support) for both undergraduate and graduate study. Like PLUS loans, they have a variable interest rate, re-calculated each year, which is not subsidized by the government.

President Clinton has announced his intention to replace the entire system of Federally guaranteed student loans with a direct loan program in which the loan principal would come from the Federal government and not from private lending institutions, and in which the institution would originate the loan and administer the overall loan process.[14] In 1992, Congress authorized a pilot program to test such an approach,[15] but as of mid-1993, the pilot program was not yet underway and the specifics of the Clinton direct loan program were still being developed.

Summary of Significant Program Trends

There have been several significant trends and related policy issues which have emerged in the administration of these student aid programs.

First, the amount of aid and the conditions for eligibility for the Pell Grant and Federal campus-based programs have been stringently limited. Those students who qualify must satisfy dozens of eligibility criteria, many of which have been criticized as both unnecessarily burdensome and cumbersome and as a barrier to student access.

Second, there has been a significant expansion in the portion of Title IV aid represented by loans as opposed to grants. The increasing costs of higher education and the politics of the 1980's have transformed the typical financial aid recipient from one primarily reliant on grants to one primarily reliant on loans to finance college education.

Third, the combination of students' higher loan burdens, the depressed economy,[16] and miscellaneous other factors has resulted in a marked increase in the default rate for the repayment of guaranteed student loans.

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14. *See* Letter from Richard W. Riley, U.S. Secretary of Education, to College and University Presidents (Dear Colleague Letter No. GEN-93-12, April 30, 1993); P. Simon and L. Hough, "Direct Loans to Students: Two Views—'A Bold, Innovative Program'; 'An Unproven Experiment,'" *The Chronicle of Higher Education*, May 12, 1993, pp. B1-B3; U.S. General Accounting Office, *Guaranteed Student Loan Program's Internal Controls and Structure Need Improvement* (March 1993); U.S. General Accounting Office, *Student Loans: Direct Loans Could Save Billions in First Five Years With Proper Implementation* (Nov. 25, 1992).

15. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 451, 1992 U.S.C.C.A.N. (106 Stat.) 448, 569-76 (to be codified at 20 U.S.C. § § 1087a et. seq.). On April 2, 1993, the Department of Education issued proposed regulations concerning the new direct loan program. *See* 58 *Fed. Reg.* 17, 472 (Apr. 2, 1993). Early reactions to the Department's plan for implementing the new direct loan program have been mixed. *See, e.g.*, "Proposed Rules for Direct Loan Pilot Too Harsh, Critics Say," *Education Daily*, at 5 (Apr. 15, 1993).

16. A particularly troublesome trend is the increasing number of college graduates encountering serious difficulty in finding jobs or accepting jobs for which a college education is not a prerequisite. As reported recently in *The Wall Street Journal*, citing research by a university employment official, "at least 35% of recent graduates now take jobs that don't require college degrees, up from about 15% five years ago." "College Class of '93 Learns Hard Lesson: Career Prospects Are Worst in Decades," *The Wall Street Journal*, May 20, 1993, p. B1.

The increase, in fact, has been so substantial that, as of 1992, payments on defaults constituted approximately 70% of the Federal outlays for the Federal Guaranteed Student Loan program.[17] Due largely to concern with the spiralling default costs, the Department of Education in 1989 promulgated a default reduction initiative,[18] followed in 1990 by Congress enacting the Student Loan Default Prevention Initiative Act.[19] The current provisions of this Act bar institutions from participating in the federally guaranteed student loan programs if their default rates exceed specified levels, and subject them to possible termination from participating in all the Title IV programs if their default rates are especially high.[20]

Fourth, the U.S. Department of Justice has launched an initiative to eliminate what it perceives as anti-competitive practices among certain private colleges and universities in violation of federal antitrust laws.[21] The objectionable conduct centers on the practice of university financial aid officers consulting, and agreeing among themselves, on the dollar amount of individual students' need and expected family contribution, thus allegedly negating competition among the institutions through the offering of financial aid packages to students. The Justice Department probe has caused many institutions to agree "voluntarily" to cease the questioned practices, and has also resulted in a Federal court decision finding such conduct to be prohibited anti-competitive conduct, rejecting the institution's arguments that this practice helped conserve financial aid resources, and that nonprofit institutions were not covered by Federal antitrust laws.[22] The ultimate effect on students' aid awards of institutions discontinuing this type of collaboration is unclear at this time.

Fifth, the awarding of scholarship aid targeted specifically for minority students has emerged as a controversial issue that may affect institutions' entire financial aid packaging practices, especially private source aid. In

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17. *See Departments of Labor, Health and Human Services, Education and Related Agencies, Appropriations for 1993 Hearings Before a Subcommittee of the Committee on Appropriations*, 102nd Cong., 2d Sess. 258 (Feb. 20, 1992).

18. *See* 54 *Fed. Reg.* 24,119 (June 5, 1989) and 54 *Fed. Reg.* 37,267 (Sept. 7, 1989) (codified at 34 C.F.R. Pts. 668 & 682 *passim* (1992)).

19. Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, 1990 U.S.C.C.A.N. (104 Stat.) 1388, 1388-25 (codified at 20 U.S.C. § § 1001 note, 1078, 1078-1, 1078-1 notes, 1078-6, 1078-6 note, 1085, 1085 note, 1088, 1088 note, 1091; 11 U.S.C. § § 362 notes & 1328 note).

20. However, *see Atlanta College of Medical and Dental Careers v. Riley*, 987 F.2d 821 (D.C. Cir. 1993), in which a federal court of appeals upheld a college's challenge to its termination of eligibility for high guaranteed student loan default rates and finding that the government's application of the administrative appeal process was arbitrary and capricious on the ground that the government's decision in the administrative appeal had failed to provide any justification for the refusal to consider alternative data submitted by the college demonstrating errors in the government's calculated default rate for the college.

In another case, the same court held that the Student Loan Default Prevention Initiative Act and its implementing regulations are not unconstitutional because they do not undo past eligibility of schools participating in Title IV programs; instead they require the Department of Education to look at a school's past cohort default rates in determining future eligibility. *Ass'n of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859 (D.C. Cir. 1992).

21. For a general description of the Justice Department's investigation, *see* "Antitrust Division Probing Top Colleges' Tuition and Aid," *Washington Post*, Aug. 9, 1989, p. A1; "U.S. Probes Tuition and Student Aid on 20 Private Campuses," *The Chronicle of Higher Education*, Aug. 16, 1989, p. A1. *See also* Note, "Financial Aid and Antitrust: Financial-Aid Packages Subject of Justice Department Probe," 17 *J. of Coll. and Univ. Law* 43 (1990); "The Antitrust Laws and the Overlap Group" 42 *Syracuse Law Review* 217 (1991).

22. *U.S. v. Brown University*, 805 F. Supp. 288 (E.D. Pa. 1992). This suit was brought against the Ivy League institutions and the Massachusetts Institute of Technology (MIT), but the Ivy League institutions settled before trial by agreeing to abandon certain questioned activities. Thus, despite the name of the case, only MIT took the case to trial, and has now appealed the district court's adverse decision to the U.S. Court of Appeals for the Third Circuit.

1990, the Office for Civil Rights of the U.S. Department of Education caused considerable controversy and confusion when it announced that such race-exclusive scholarship violated Title VI of the Civil Rights Act of 1964.[23] This policy was thereafter "clarified" at the direction of President Bush,[24] but further Departmental action was stayed at the request of Congress, which mandated a review by the General Accounting Office.[25] The newly-appointed Secretary of Education has expressed his basic support for minority scholarships,[26] although a recent Federal court ruling has questioned the award of such scholarships.[27] The only certain element in all of this is that all three branches of the Federal government will no doubt be involved before these issues are settled.

These important trends have had significant impact on the administration of the Federal student aid programs, and will likely continue to affect institutional decision-making for years to come.

Institutional Eligibility and Role in the Title IV Programs

Institutional Eligibility

Title IV of the Higher Education Act and its implementing regulations[28] define the conditions and procedures for institutions of higher education to qualify for participation in one or more of the Federal student aid programs. First, institutions are required to be licensed by the State or States in which the institution operates and to be accredited by an accrediting body formally recognized by the U.S. Secretary of Education.[29] In addition, the institution is required to demonstrate sufficient administrative capability and fiscal responsibility to administer the Title IV programs adequately.[30] Legislation enacted in 1992 significantly increased the role of the states in measuring institutional capabilities, particularly for institutions that fall below certain performance standards or that meet other triggering requirements established by Congress.[31]

To establish compliance with these requirements, institutions complete an Application For Institutional Eligibility and Certification, which, if accepted,

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23. *See* U.S. Department of Education, *Fiesta Bowl Officials Advised of Civil Rights Obligations* (press release, Dec. 4, 1990).

24. *See* U.S. Department of Education, *Department Issues Policy Statement on Race-Exclusive Scholarships* (press release, Dec. 18, 1990); *See also* "Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance," 56 *Fed. Reg.* 64548 (Dec. 10, 1991).

25. *See* Letter from Lamar Alexander, U.S. Secretary of Education, to William D. Ford, Chairman, Committee on Education and Labor, U.S. House of Representatives (June 10, 1992).

26. *See* "Incoming Education Secretary Endorses Minority Scholarships as 'Good and Legal,'" *The Chronicle of Higher Education*, Jan. 20, 1993, p. A20.

27. *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992).

28. General regulations for all of the Title IV programs are set forth at 34 C.F.R. Part 668, with additional regulations relating to institutional eligibility contained at 34 C.F.R. Part 600. In addition, each of the individual Title IV programs is governed by program-specific regulations, all contained in Title 34 of the Code of Federal Regulations, as follows: Income Contingent Loans (Part 673); Perkins Loans (Part 674); Work-Study (Part 675); Supplemental Grants (Part 676); FFEL Loans (Part 682); Pell Grants (Part 690); and State Student Incentive Grants (Part 692).

29. *See* 20 U.S.C. § 1085 (1988 & Supp. III 1991), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 481, 1992 U.S.C.C.A.N. (106 Stat.) 448, 609-612. *See also* 34 C.F.R. § 600.4(a)(3), (a)(5) (1992).

30. *See* 34 C.F.R. § § 668.13-.15 (1992).

31. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 499, Subpart 1, 1992 U.S.C.C.A.N. (106 Stat.) 448, 635-641.

leads to the issuance of an eligibility notice and the execution of a Program Participation Agreement between the Department of Education and the institution. By entering into such an Agreement, each participating institution is considered to be a trustee of the Federal funds it receives and administers for student beneficiaries under the Title IV programs.[32] Further, each participating institution assumes the role of a fiduciary, subjecting it to rigorous standards of care and diligence in administering such programs and in accounting to the Department of Education for the Federal funds so received.[33]

The Program Participation Agreement includes a panoply of other commitments on the part of the institution, for example, a certification by the institution that it has a drug abuse prevention program in operation, that it will publish an annual report containing campus security policies and crime statistics, and that it will comply with a series of Federal anti-discrimination laws. The Program Participation Agreement also provides that, in executing the Agreement, the institution agrees to comply with all applicable laws and regulations governing the Title IV programs, including laws and regulations that supersede the requirements in effect when the institution first entered into the Agreement.

Certain changes in institutional operations require notification to or approval by the Department of Education. These changes include the addition of new locations at which educational services are offered, the establishment of agreements with other institutions, and any change in the name or address of the institution. Moreover, in the 1992 reauthorization of the Higher Education Act, Congress mandated that the Secretary of Education prescribe a five-year schedule whereby the eligibility of all institutions participating in the Title IV programs prior to July 23, 1992 would expire on a staggered basis. Upon the expiration of an institution's eligibility, the institution must apply for a renewal of eligibility, which the Department will typically grant for a four-year period.[34]

Practice Suggestion

In view of the basic importance of the Program Participation Agreement to the institution, both the President and campus counsel should have the Agreement immediately available, review it periodically, and institute procedures whereby they will be made aware of any circumstances that indicate non-compliance with its terms. Moreover, institutional officials should ensure that the institution's eligibility status is kept current and that all required changes are reported on a timely basis to the Department of Education.

Institutional Role in the Award and Disbursement of Title IV Funds

Once an institution's eligibility has been certified and a Program Participation Agreement entered into with the Department, and provided the institution's eligibility is up-to-date with the Department, the institution may then undertake to receive Title IV funds, and disburse them to its students, in accordance with the requirements of the individual Title IV programs.

32. 34 C.F.R. § 668.16 (1992).

33. 34 C.F.R. § 668.82 (1992).

34. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 499, 1992 U.S.C.C.A.N. (106 Stat.) 448, 650.

For a student seeking to receive a Pell Grant,[35] the process begins with the student completing a standardized form approved by the Department of Education, known as the Free Application for Federal Student Aid (FAFSA). The student then submits the completed application to a needs analysis service, which has entered into a contract with the Department of Education. The needs analysis service performs certain database matches to confirm Selective Service registration,[36] citizenship status, previous loan default information and the accuracy of the student's social security number. The service then calculates an expected family contribution and transmits it via a Student Aid Report (SAR) either to the student or directly to the institution if the latter participates in electronic Pell Grant processing. If transmitted to the student, he or she in turn submits the SAR to the institution, which performs certain steps prescribed by the Department, such as verifying enrollment status, calculating the cost of attendance, determining the portion of the cost of attendance which the student and family (if applicable) would be expected to contribute, determining the amount of the Pell Grant from the appropriate payment schedule, and notifying the student of the expected disbursement.

An institution participating in electronic Pell Grant processing may draw down an Electronic Student Aid Report (ESAR) directly, an important processing change that should facilitate the institution's efficiency in processing Pell Grants. It is at this point that the institution is said to "obligate" Federal funds, i.e., accepting the SAR or ESAR, and agreeing to pay the student the amount of the Pell Grant the institution has calculated.

For the Federal campus-based programs (Perkins Loans, Supplemental Grants and Work-Study), the institution receives an annual allocation of federal funds, to which it must add institutional matching funds.[37] For most institutions, the Federal allocation falls far short of meeting the need of all eligible applicants. Each institution therefore is responsible for developing its own policies for selecting recipients from the pool of students applying for these funds. As such, institutions are permitted to establish their own application deadlines and priorities concerning how and to whom funds are awarded, but their selection procedures must be applied uniformly, must not discriminate against particular categories of students (most notably those attending the institution on a part-time basis), and must be in writing. Program specific requirements for each of the Federal campus-based programs must also be taken into account in the awarding and packaging of aid. In addition, because the amount of a student's Federal campus-based awards is based on a financial need formula, the institution is required to coordinate all sources of student financial aid (including federal, state, local, institutional and private source financial aid) to ensure that each student's total aid package does not exceed his or her financial need.

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35. For a more detailed description of the operation of the Pell Grant Program and the institution's role therein, see Office of Student Financial Assistance, U.S. Dept. of Educ., *Federal Student Financial Aid Handbook* (1992-93), ch. 4.

36. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (holding that statute denying Federal financial aid to male students who failed to register for the draft did not violate the Fifth Amendment privilege of non-registrants and was not a bill of attainder).

37. For a more detailed description of the operation of the Federal Perkins Loan, Work-Study and Supplemental Grant programs, and the institution's role therein, see Office of Student Financial Assistance, U. S. Dept. of Educ., *Federal Student Financial Aid Handbook* (1992-93), at chs. 5, 6, 7, and 8.

In contrast to the Pell Grant and Federal campus-based programs, the FFEL guaranteed student loan program does not involve institutional application for funds, selection of recipients or even the making of awards.[38] The application, awarding and payment process is a complex one involving five principal parties: the student, the school he or she is attending, a lending institution, the respective guaranty agency, and the Department of Education.

The student initiates the FFEL loan process by submitting to the institution a loan application containing certain eligibility information. The institution reviews that information and certifies the student's eligibility to receive a loan. The student then submits the loan application and the institution's certification to a lender of his or her choice (any bank, savings and loan institution or other lender approved by the Department of Education), and the lender determines whether or not to make a loan to the student.[39]

The student's loan under the FFEL program is guaranteed against the student's default, death, disability or bankruptcy by a "guaranty agency," which is a state agency or private entity certified by the Department of Education. There are approximately 45 guaranty agencies that administer these loan programs on a state, regional, or national basis. If the student defaults on the loan, or if one of the other triggering events occurs, the guaranty agency pays the remaining balance on the loan to the lender, but only after determining that the underlying loan documentation is complete and that the lender serviced the loan properly according to detailed regulatory requirements. The guaranty agency may in turn seek repayment of this amount from the Department of Education, which is the ultimate guarantor of loans under the FFEL program. The Department of Education has overall responsibility for administering the FFEL program and for periodically evaluating the performance of all the other participating parties.

Practice Suggestion

While an institution cannot control whether its former students repay their FFEL loans, current law requires the Department of Education to calculate a "cohort default rate" for each institution for each fiscal year, based on the percentage of its former students who default on their loans. The cohort default rate is used by regulators and lenders as a measure of an institution's performance in administering its Title IV programs, as well as a trigger for requiring various administrative actions by institutions, and, if high enough, it is used for restricting access of an institution's future students to FFEL loans and other Title IV assistance. As such, senior administrators and campus counsel should place top priority on counseling students about their loan obligations and on implementing effective default management plans.

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38. For a more detailed description of the operation of the FFEL guaranteed student loan program and the institution's role therein, *see id.* at ch. 10.

39. If a lender chooses not to make a loan to an eligible student—e.g., if the student is attending a school with a high loan default rate—and if the student cannot secure a loan from another lender, the relevant guaranty agency must find another lender or become the "lender of last resort" itself. 20 U.S.C. § 1078(j) (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 416, 1992 U.S.C.C.A.N. (106 Stat.) 448, 528.

Federal Oversight of Institutional Participation in the Title IV Programs

Institutions of higher education are subject to various forms of oversight concerning their participation in the Title IV programs. Although financial aid officers are the front-line officials charged with day-to-day responsibility for the proper functioning of these programs, the responsibility for preparing for and responding to all forms of oversight should be directed by the institution's senior executives and counsel, since such oversight entails legal and fiscal accountability for the conduct of these programs. The critical role of campus counsel in managing and controlling external reviews of the student financial aid programs cannot be overemphasized; it is essential that this critical role be recognized by both counsel and senior institutional administrators.

A prudent institution will take a number of affirmative steps, as described more fully below, to manage all external reviews in an effort to limit institutional liability.[40] Given the importance of these reviews to institutions' fiscal and legal concerns, they will be described in detail in the following pages.

The principal forms of compliance monitoring are: (a) periodic financial and compliance audits of the student financial aid programs conducted by independent auditors selected by the institution; (b) audits conducted by the Department of Education's Office of Inspector General; (c) program reviews conducted by Department of Education program staff; and (d) compliance audits conducted by guaranty agencies. Each of these reviews is intended to measure the extent to which an institution complies with its legal obligations under its contract with the Department of Education and applicable laws and regulations. Accordingly, such reviews entail the possibility of monetary liability as well as other sanctions, including limitation, suspension, or termination from the Title IV programs.[41]

Audits by Independent Auditors

Every institution is required to undergo a financial and compliance audit of its Federal student financial aid programs on an annual basis.[42] The audit must be conducted by an independent auditor in accordance with standards promulgated by the U.S. General Accounting Office (GAO),[43] as well as with the

40. For a more detailed analysis of measures institutions can undertake to minimize the risk of adverse actions resulting from external reviews of the Title IV program, see Blain B. Butner, "Limiting Liability from Program Reviews and Audits," *NASFAA Student Aid Transcript*, at 12 (1989).

41. Recognizing the "extensive enforcement authority" given to the Department of Education to enforce compliance with Title IV requirements, courts have generally refused to recognize any implied private right of action by participants or beneficiaries (i.e., students, institutions, and lenders) to file claims against each other or the government under the Higher Education Act. *See, e.g., L'garie v. Benkula*, 966 F.2d 1346 (10th Cir. 1992) (former student-borrower has no private cause of action under Title IV of the Higher Education Act); *St. Mary's of the Plains v. Higher Education Loan Program*, 724 F. Supp. 803 (D. Kan. 1989) (college has no private right of action against lender for denying loans to college's students); *Murphy v. Villanova University*, 547 F. Supp. 512 (E.D. Pa. 1982) (student has no implied private right of action pursuant to the Federal College Work-Study statute against private university for his alleged wrongful termination from employment under College Work-Study program); but *see Tipton v. Alexander*, 768 F. Supp. 540 (S.D. W. Va. 1991) (allowing student to use state consumer protection laws to hold bank responsible for loan made to student who received poor training).

42. 20 U.S.C. § 1094(c) (1988 & Supp. III 1991), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 490, 1992 U.S.C.C.A.N. (106 Stat.) 448, 627. The requirement that such audits be conducted and submitted to the Department of Education on an annual basis is a new requirement, mandated by the Higher Education Amendments of 1992. Prior to that time, such audits had to be conducted only on a biennial basis.

43. U.S. General Accounting Office, *Standards for Audit of Governmental Organizations, Programs, Activities and Functions* (1988 Revision).

Title IV Audit Guide published by the Department of Education.[44] Audit reports must be submitted to the Department of Education for review by June 30 of the year following the year covered in the audit, or March 31 if the institution does not participate in the Federal campus-based programs.

For all instances of non-compliance or material internal control weaknesses identified by the auditors, the institution must develop and submit to the Department of Education, along with the auditor's report, a Corrective Action Plan describing corrective actions for each audit finding. The institution and auditor must give Departmental officials access to all records and documents necessary to analyze the audit. Departmental officials will review the audit and require repayments for any funds found to have been awarded improperly or documented insufficiently, and may impose other penalties.[45]

Practice Suggestion

If planned and utilized properly, the required annual audit provides an important opportunity for the institution to monitor effectively and, if necessary, improve its administration of the Title IV programs. In contrast, if the audit is not managed properly, the institution may seriously jeopardize its interests.

To best protect the institution's interests, the following steps are recommended:

(1) Begin planning for the audit well in advance. A necessary starting point is the prior year's audit and Corrective Action Plan, plus any other findings by Federal or state auditors concerning the financial aid programs.

(2) Encourage the auditors to brief campus counsel and the senior financial officer on the nature of their findings before a final report is formally issued to the institution, and to allow institutional staff to comment on the audit findings in proposed draft form, in order to be certain that all pertinent knowledge and relevant information have been developed and made available.

(3) Make certain, through participation of counsel and outside consultants if necessary, that the audit is based on an assessment of all pertinent and current regulations, and is not outdated, mistaken or incomplete.

(4) If the audit identifies instances of internal control weaknesses and non-compliance, the institution's senior executives should be so apprised and should approve the Corrective Action Plan.

(5) Note that while communications between auditors and college officials are not in themselves confidential, notes and memoranda prepared by campus counsel during this process likely would be.

Audits by the Office of Inspector General

Auditors from the Office of Inspector General (OIG) of the U.S. Department of Education may also conduct an audit of an institution's administration of the Title IV programs. These audits are not conducted regularly, and the

44. Office of Inspector General, U.S. Dept. of Education, *Audit Guide of Student Financial Assistance Programs* (March 1990), *updated by* Office of Student Financial Assistance, U.S. Department of Education, "Dear Colleague" Letter No. GEN-92-17 (Sept. 1992).

45. *See* 34 C.F.R. § 668.24 (1992).

regulations governing them are less specific than those for the annual audits performed by the independent accounting firms.[46]

Most institutions never face an OIG audit, principally because the OIG has only limited resources for this activity. OIG audits typically result from a perceived problem at the institution or from a nationwide audit of selected issues for which the institution is chosen to participate. During this type of audit as well, the institution must give the auditors access to all records and documents pertaining to its administration of the Title IV programs. Upon conclusion of the OIG audit, as with independent audits, an institution found to be out of compliance with Federal statutory and regulatory standards is subject to repayments and other penalties.

Program Reviews

Program reviews are conducted to evaluate an institution's compliance with the statutes, regulations and other policies governing the Federal student aid programs. They can be comprehensive in nature or targeted specifically to one or more individual program requirements. Such reviews are conducted by program staff from the Department's regional office where the institution is located.

A program review is generally conducted for one of two reasons. First, it may be initiated in response to particular occurrences, patterns or deficiencies at the institution. The Department of Education has a list of factors that it considers relevant in determining which institutions to review. Such factors include, but are not limited to, a high student loan default rate, significant liabilities resulting from an independent audit, institutional financial weaknesses, student complaints, and the fact that there has not been a program review in recent years.

Second, a review may be conducted based on random selection by the Department. A certain percentage of program reviews are in fact selected each year on this basis, so that even those institutions with no apparent problems are subject to review. Under criticism and prodding from Congress, the Department has modestly increased its program review staff in recent years, and in 1992, Congress directed the Department to develop a system for conducting a program review at every institution participating in the Title IV programs.[47]

Guaranty Agency Reviews

All student loan guaranty agencies are required by the Department of Education to conduct compliance audits of institutions' participation in the FFEL guaranteed student loan program on a regular basis. An institution is subject to an audit by each of the guaranty agencies that guarantees loans for any of its students. Guaranty agency audits are similar in scope, detail, and format to U.S. Department of Education program reviews and audits, except

46. *See* 34 C.F.R. § § 668.23-.24 (1992); Inspector General Act of 1978, 5 U.S.C. app. § 3 (1988).

47. "In order to strengthen the administrative capability and financial responsibility provisions of this title, the Secretary (1) shall provide for the conduct of program reviews on a systematic basis designed to include all institutions of higher education participating in programs authorized by this title...." Higher Education Amendments of 1992, Pub. L. No. 102-325, § 499, 1992 U.S.C.C.A.N. (106 Stat.) 448, 652.

that they normally focus only on compliance with FFEL program requirements. Some guaranty agencies that are agencies of individual states combine auditing of the FFEL program with auditing of compliance with state grant and loan program and other state regulatory requirements.[48]

Other Federal Oversight Reviews

An institution perceived to have significant Title IV compliance problems or to have engaged in fraud or criminal misconduct may be subjected to one of the very serious—and very rare—other types of Federal oversight reviews. These include an investigation by the Office of Inspector General for Investigations, an inspection by one of the OIG's recently created Inspection Teams, or a criminal investigation by the Federal Bureau of Investigation or U.S. Attorney. These are very serious types of examinations which usually portend the most drastic types of sanctions.

Practice Suggestion

Given the serious nature and consequences of these Federal oversight reviews, as soon as there is any indication that such a review is going to take place, senior institutional officials and campus counsel should be notified immediately. Blunders in dealing with such a review can seriously impair an institution's interests. Specific actions that can be taken to help avoid such blunders are discussed more fully below.

The Audit and Program Review Process

The first four types of reviews discussed above each have certain common procedural characteristics, most notably: (1) pre-review notification and request for documents; (2) entrance conference; (3) on-site review; (4) exit conference; (5) report of findings and recommendations; (6) institutional response; (7) program determination; and (8) appeals process. Each of these steps requires a careful and coordinated approach by the institution, with senior administrators and counsel playing important roles throughout.

Pre-Review Notification and Request for Documents

The pre-review notification and request for documents should be treated with the same attention and concern as the filing of a legal action against the institution, although this principle seems honored more often in the breach than in the observance. The pre-review notification will provide, at least preliminarily, an indication of the scope and focus of the reviewing authority's interest. An immediate question is whether the selection of the institution has been random or whether it is related to specific facts and occurrences that have come to the attention of the reviewers.

The pre-review notification should set in motion a careful and coordinated institutional response involving, at the very least, notice to campus counsel, the chief executive officer and the chief financial officer. Common—and

48. An example of a state guaranty agency that regularly audits compliance with state law requirements as a part of its guaranteed student loan audits is the California Student Aid Commission. *See* Cal. Educ. Code § 69763 (West. Supp. 1993); Cal. Code Regs. tit. 5 § § 30116, 30215 (1992).

potentially disastrous—assumptions which are sometimes made by the financial aid staff of the institution are that "the inquiry is routine," that the institution is "obliged to provide whatever is asked," that the matter is only "administrative" and not "legal" (because no court is involved), or that the president "wouldn't want to be bothered" with the minutiae of a financial aid review. (In one very real case, the president of a university first learned of the existence of a program review when a demand for a repayment of $30 million arrived in the mail.) Counsel and the chief executive should ensure that campus administrators involved in any such review notify the college attorney at the outset of the review.

Entrance Conference

The entrance conference, following the pre-review notification and request for documents, is also a critical organizing point for the institution. The entrance conference enables the institution to ascertain in greater detail the scope of the review and to establish ground rules for the on-site phase of the review. The institution should designate a single contact person to handle all requests for records and interviews. While counsel certainly ought to be involved (by early notification and consultation), he or she does not necessarily need to be present physically at the entrance conference. However, senior campus personnel, preferably at least at the vice presidential level, should attend. A prepared institution can set the tone for the entire review at the entrance conference.

On-site Review

The on-site review involves a review of institutional policies and procedures, an examination of individual student records and fiscal records, and interviews with relevant personnel.[49] While as a general rule counsel need not be present throughout this phase, it is important for the institution to document systematically the issues raised in the on-site review and to de-brief any personnel who were interviewed. Counsel should also be consulted regarding any request for institutional records that are not clearly within the reviewers' right of access (e.g., general institutional financial records and records of individual students who are not Title IV aid recipients), and should ensure that document production is handled in such a way as to protect institutional interests. Counsel's monitoring of the on-site review process and notes of interviews ordinarily would be considered work product of counsel, protected from subsequent disclosure and available to senior administrators as a candid assessment of the progress of the review.

Throughout the review, counsel should avoid giving the impression that he or she represents anyone other than the institution. In making the most effective response possible to an inquiry, institutional counsel will often seek the cooperation of employees, but will need to make clear that he or she is not

49. Federal regulations require institutions participating in the Title IV programs to cooperate with the reviewing authorities in providing access to relevant records and personnel. *See* 34 C.F.R. § 668.23 (b) (1992). These same rules provide further that an institution may not require representatives of institutional management to be present during employee interviews and may not require that employee interviews be tape-recorded.

representing them. If counsel becomes aware of a conflict of interest between an employee and the institution, the issue of appropriate further representation will need to be resolved.

Exit Conference

At the conclusion of the on-site phase of the review, the institution will be afforded an exit conference, at which the reviewers should be asked to identify all areas of concern and noncompliance that they propose to raise in the written report, and to identify any needed documents which have not yet been provided. This approach is very important because it often will be the institution's first and best opportunity to convince the reviewers to delete proposed adverse findings. As such, and assuming the preparatory steps recommended above have been taken, it may be both appropriate and beneficial for institutional counsel to attend the exit conference. Their presence can serve to demonstrate the institution's seriousness in handling the inquiry, and to ensure that asserted noncompliance with any legal requirements is understood adequately by the institution and if necessary refuted.

Report of Findings and Recommendations

Following the exit conference and receipt of any additional materials requested, the reviewers will issue a written report describing the scope of the review, making findings and identifying areas of noncompliance. For a program review or guaranty agency review, there is only one such report. For an audit conducted by the Office of Inspector General, there is a draft audit report and a final audit report. For an independent audit, while not required by regulation, the auditors should be asked to provide the salient portions of their report to the institution in draft form before issuance of the final written report.

Institutional Response to Written Report

The institution will be afforded an opportunity to respond in writing to the reviewers' written report (and to the draft report, if there is one) to rebut adverse findings and to correct any errors. The institution may also request a meeting with the auditors or program reviewers to discuss the report further and to attempt to negotiate a resolution. If the institution believes the results of the audit or program review are not representative of its practices, particularly if the report is based on just a sampling of student files, the institution may conduct its own review and present the results to the reviewers for consideration.

At this point, especially, the active involvement of counsel is critical in evaluating the accuracy and validity of the reviewers' report, in framing a written response, in evaluating strategy, and, if appropriate, in participating in meetings with the reviewers. The institution should aggressively develop a detailed response to the reviewers' written report as a key component of protecting the institution and minimizing the likelihood of repayment liabilities and other adverse actions.

Program Review or Audit Determination

After all institutional comments are considered, the Department issues either a final program review determination or a final audit determination.[50] The former is made by the Regional Office of the Department of Education that conducted the review; the latter is made by the Department's Audit Resolution Branch in the Office of Student Financial Assistance Programs in Washington, D.C., regardless of whether the audit was conducted by independent auditors or by the OIG.

The final determination letter specifies all identified areas of asserted noncompliance by the institution, and may include any or all of the following actions: (a) repayment of funds to the Department of Education; (b) repayment of loan funds to lending banks; (c) assessment of a fine; (d) revision of institutional policies and procedures; (e) follow-up reports to the Department of Education; and (f) referral to the Department's Compliance and Enforcement Division for initiation of a formal administrative proceeding (see Part VI below).

The final determination letter is the official decision of the Department and is binding on the institution, unless appealed in a timely manner. Interest is assessed on any asserted liability that is not paid within 45 days. It should be noted that once a final program review determination is issued by a Regional Office, that office views itself as no longer having jurisdiction of the program review, and, accordingly, any further attempt at negotiated resolution should take place with the Office of Student Financial Assistance Programs in Washington.

Program Review and Audit Appeals Process

The Department of Education has a formal appeals process by which an institution may appeal an adverse final program review or audit determination.[51] The appeals process is complex, is in many ways stacked against the institution, and has been characterized by one experienced practitioner as "unduly burdensome, unnecessarily complicated, and legally defective."[52]

The appeals process requires the institution to file a "request for review" within 45 days of the institution's receipt of the final program review or audit determination. The request for review must identify the issues and facts in dispute, include a statement of the institution's position on each disputed point, and, quite significantly, be accompanied by the submission of all records and evidence on which the institution intends to rely in its appeal (with limited exceptions as described below). These requirements place an enormous burden on the institution, which must analyze, assemble and copy all potentially relevant records within this relatively short 45-day period.

After the institution files its request for review, the Department of Education has 30 days to submit the records and evidence on which it intends to rely

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50. *See* 34 C.F.R. § 668.24(b)(1) (1992).

51. *See* 20 U.S.C. § 1094(b) (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 490, 1992 U.S.C.C.A.N.(106 Stat.) 448, 625-628. The regulations governing the program review and audit appeals process are set forth at 34 C.F.R. §§ 668.111-.123 (1992), *amended by* 57 *Fed. Reg.* 47, 753-754 (Oct. 19, 1992) and 57 *Fed. Reg.* 60,034 (Dec. 17, 1992).

52. Leslie H. Wiesenfelder, "Institutional Liability for Federal Student Financial Aid," 37 *Fed. Bar News and J.* 612 (Dec. 1990).

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during the appeal. These deadlines have been strictly construed against both the Department and the institution.[53] Moreover, under the somewhat unusual rules that apply to requests for review, the institution does not have an opportunity to submit any new evidence in response to the evidence submitted by the Department. It may, however, submit within the same 30-day period permitted for Department of Education submissions any Department records that it did not submit for whatever reason with its initial request for review. Finally, documents sent by the institution to the Department during the process of the audit or program review, as well as Department of Education audit reports, program review reports and underlying work papers, need not be submitted by either party until the briefs are submitted.

The actual conduct of the appeal is handled by an assigned Hearing Official,[54] who sets the briefing schedule, holds a pre-hearing conference at his or her discretion and, if requested and approved, conducts oral argument. The hearing process does not involve an evidentiary hearing or the examination of witnesses, but rather only the submission of briefs and an optional oral argument. The burden is on the institution to prove that any expenditures questioned or disallowed were proper, and that the institution complied with applicable program requirements. Moreover, when these appeals regulations were first published in the Federal Register, the preamble (but not the rules themselves) stipulated that the Hearing Official is to apply the same rule of deference to an agency's interpretations of its statutes and regulations that is observed by Federal courts.[55]

The written decision of the Hearing Official may be appealed to the Secretary of Education by either party within 30 days of its issuance.[56] This second level of appeal is also based on written briefs, and no new evidence may be introduced at this stage. The decision of the Secretary (unless the matter is remanded to the Hearing Official) is the final decision of the Department. That decision in turn is subject to review in Federal Court on the administrative record pursuant to the Administrative Procedure Act.[57]

Practice Suggestion

This appeals procedure is very formal and restrictive, and as such has the effect of limiting informal negotiations and settlement of matters. Institutions should note particularly (1) the tight time frame (45 days) for filing a request for review and for submitting supporting evidence, (2) the nature of the appeals process, which precludes testimony and cross-examination, and (3) the limits on relevant evidence (evidence will generally be considered irrelevant if it relates to a time period other than that covered by the program review or audit, if it

53. *See* Academy for Social Action, No. PRCN 88302039 (U.S. Dept. of Educ. Sept. 22, 1988), as an example of a case in which the Department's late-submitted evidence was stricken from the record.

54. The presiding official was an Administrative Law Judge until the Department of Education eliminated this requirement in regulations published on October 19, 1992, specifying only that a designated Hearing Official be appointed. 57 *Fed. Reg.* 47,753-754 (Oct. 19, 1992).

55. *See* 52 *Fed. Reg.* 30,114 (Aug. 12, 1987).

56. 34 C.F.R. § 668.119(a) (1992), *amended by* 57 *Fed. Reg.* 60,034 (Dec. 17, 1992).

57. *See* 5 U.S.C. § § 701(a), 702, 704 (1988). *See also, e.g., Bell v. New Jersey*, 461 U.S. 773 (1983); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

relates to a program review or audit of another institution, or even if it relates to the current practices of the institution bringing the appeal). In order to maximize the likelihood of a successful institutional appeal, campus counsel and senior administrators should begin preparing for the appeal *before* the final audit or program review determination is even issued (assuming that a prepared institution will have ascertained that an adverse determination may be forthcoming).

Fine, Limitation, Suspension, and Termination Proceedings

In addition to assessing liabilities for past instances of noncompliance with Title IV requirements, the Department of Education has the statutory authority to impose a fine upon, or to limit, suspend, or terminate the future eligibility of, any institution participating in the Federal student aid programs.[58] In theory, the Department may take any of these actions if it determines that the institution has violated any applicable statute, regulation or agreement. In practice, however, these punitive actions are usually initiated only when there have been recurring or particularly serious violations of Federal law. Given the serious nature of these proceedings, campus counsel should be involved from the outset.

Fine, limitation, suspension and termination proceedings are commenced by written notice from the Department stating the Department's intention to take a specific action, the consequences of such action, and its effective date (at least 20 days following written notice to the institution). The institution may contest the proposed action before its effective date either by filing written materials or by requesting a hearing. If only written submissions are made, a designated Departmental official will review them and render a decision. On the other hand, if a hearing is requested, no written submission needs to be made at that time; the matter will be referred to a Hearing Official who will hear the case.

Unlike the appeals process for final program review and audit determinations, the hearing in a fine, limitation, suspension or termination proceeding is a trial-type proceeding in which the Department of Education (rather than the institution) has the burden of proof, and which includes the submission of evidence and the examination of witnesses. However, discovery as provided by the Federal Rules of Civil Procedure is not permitted and there is no subpoena power. The decision of the Hearing Official may be appealed to the Secretary of Education, whose decision is the final decision of the Department. An institution may, of course, further challenge any such decision by bringing an action against the Department in Federal Court.[59]

Emergency Actions

A related type of action that the Department can take against colleges and universities is an "emergency action," the effect of which is to suspend

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58. *See* 20 U.S.C. § 1094(c) (1988, Supp. I 1989, Supp. II 1990 & Supp. III 1991). The regulations governing these types of proceedings are set forth at 34 C.F.R. § § 668.81-.97 (1992), *amended by* 57 *Fed. Reg.* 60,034-035 (Dec. 17, 1992) and 58 *Fed. Reg.* 13,336-345 (March 10, 1993).

59. *See* references cited in footnote 57 *supra*.

immediately and without notice an institution's ability to obligate, receive or disburse any further Title IV funds.

The Department's regulations have for years provided that the Department can take emergency action against an institution without affording the institution an opportunity for a pre-deprivation hearing, as is required for fine, limitation, suspension and termination proceedings. In response to a Federal court decision finding emergency actions invalid in the absence of clear statutory authority,[60] however, Congress amended the Higher Education Act to provide such authority, and the Department's regulations subsequently were rewritten.[61] Although they now include the opportunity for an institution to have a "show cause" hearing to demonstrate that the emergency action is unwarranted, such hearing occurs *after* the emergency action has been imposed.

Recent Legislative Developments

The Higher Education Act of 1965, which contains the legal authority for all of the Federal student aid programs, is subject to reauthorization by the Congress approximately every six years. The last Reauthorization in 1992 set forth broad parameters for the student aid programs for the next several years, and made hundreds of changes to the manner in which these programs are administered.[62] It should be noted, however, that although the periodic reauthorization process is the source of the primary statutory amendments to the Title IV programs, Congress often sees fit to further modify the programs in between the scheduled reauthorizations. Such amendments may take the form of stand-alone legislation, or they may be tacked onto other related (or wholly unrelated) legislative vehicles.[63] Thus, the governing law appears to be in a constant state of flux.

Because the reauthorization process involves a complete rewriting of the Higher Education Act, it usually takes the Department of Education a very long time to issue regulations and other guidance interpreting statutory changes. For example, the omnibus regulations implementing the statutory changes made to the Guaranteed Student Loan Program by the *1986* Reauthorization Act were not issued until December *1992*, several months *after* the 1992 Reauthorization Act was signed into law.[64] As a result, not only were many of the regulations out of date as soon as they were published, but they were com-

60. *See Ross University School of Medicine v. Cavazos*, 716 F.Supp. 638 (D.D.C. 1989).

61. 20 U.S.C. § 1094(c)(1)(G) (Supp. I 1989, Supp. II 1990 & Supp. III 1991), *amended by* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2006(c)(3); 34 C.F.R. § 668.83(a)(2) & (e)(1)-(2) (1992), *amended by* 58 *Fed. Reg.* 13, 338-345 (March 10, 1993).

62. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, 1992 U.S.C.C.A.N. (106 Stat.) 448. The prior reauthorization occurred in 1986. *See* Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268.

63. For example, between the 1986 and 1992 Reauthorization Acts, Congress enacted at least eight separate, major revisions to the Title IV programs. *See* Student Financial Assistance Technical Corrections Act of 1988, Pub. L. No. 99-320, 100 Stat. 491; Higher Education Technical Amendments Act of 1987, Pub. L. No. 100-50, 101 Stat. 335; Student Loan Reconciliation Amendments of 1989, Pub. L. No. 101-233, 103 Stat. 2111; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Drug Free Schools and Community Act of 1989, Pub. L. No. 101-226, 103 Stat. 1928; Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 104 Stat. 2381; Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-25; Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, 105 Stat. 1049. In addition to these statutes, Congress frequently includes in annual appropriations acts additional provisions relating to the Title IV programs for the year covered by the appropriations.

64. *See* 57 *Fed. Reg.* 60,280 (Dec. 18, 1992).

pletely at odds with the new legislation. The Secretary of Education was thus forced to suspend implementation of those regulations for an indefinite period of time, leaving no official regulations in place.[65]

Needless to say, none but a few, brief, incidental regulations resulting from the 1992 Reauthorization Act have been published in the first year since the enactment of that legislation. While the Department promises swifter action than with the 1986 Reauthorization Act, many observers believe that it will be at least two years, if not longer, before most of the new regulations implementing the 1992 Reauthorization Act are in place.

The Department's slowness in issuing regulations and other guidance can leave institutions perplexed as to how certain statutory provisions will be interpreted and enforced. For example, the 1992 Reauthorization Act mandated a myriad of significant changes to the operation of the Federal student aid programs for which regulations are needed to enable institutions to ensure their compliance, including:

- a new requirement that institutions have a "fair and equitable" refund policy for students receiving Title IV aid (as discussed more fully below);[66]
- a new definition of "academic year," requiring institutions with fewer than 30 weeks of instructional time to prorate the amounts of guaranteed student loans;[67]
- new, stringent requirements for evaluating an institution's financial strength, which will enable the Department of Education to take adverse action against a non-performing institution (likely to affect especially private colleges and universities);[68] and
- a new requirement that a student's Title IV award must be reduced in certain cases if the student's course work includes instruction by telecommunications.[69]

In the absence of any implementing regulations and additional guidance, institutions are simply left to struggle with their own attempts to comply with these—and other—statutory requirements.

Case in Point: New Refund Requirements

A good example of a new law awaiting regulations to clarify how it will be interpreted and applied by the Department of Education is the provision in the 1992 Reauthorization Act that mandates each institution receiving Title IV aid to have in place a "fair and equitable" refund policy regarding charges to students receiving Title IV aid.[70]

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65. Letter from Secretary of Education Richard W. Riley to Senator Edward M. Kennedy, Chairman, U.S. Senate Committee on Labor and Human Resources, January 29, 1993.

66. 20 U.S.C. § 1091(b) (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 485(a), 1992 U.S.C.C.A.N.(106 Stat.) 448, 619.

67. 20 U.S.C. § 1088(d) (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 481, 1992 U.S.C.C.A.N. (106 Stat.) 448, 611.

68. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 499, 1992 U.S.C.C.A.N. (106 Stat.) 448, 647-48.

69. 20 U.S.C. § 1091 (1988, Supp. II 1990 & Supp. III 1991), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 484, 1992 U.S.C.C.A.N. (106 Stat.) 448, 617-18.

70. 20 U.S.C. § 1091(b) (1988), *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 485(a), 1992 U.S.C.C.A.N. (106 Stat.) 448, 619.

According to the statute, a refund policy is deemed to be "fair and equitable" if it provides a refund to the student of at least the amount which is the largest under: (1) applicable state law; (2) a policy approved by both the institution's nationally recognized accrediting body and the Department; or (3) a mandatory policy for all first-time students (freshmen, transfer, or graduate) who have not yet passed 60 per cent of the enrollment period for which charges have been assessed. Under this mandatory policy (and assuming the student has not yet passed the 60 per cent threshold), the required pro rata refund is that portion of the assessed tuition, fees, room and board equal to the portion of the first enrollment period for which the student has been charged that remains on the last day of attendance, rounded downward to the nearest ten per cent, minus any unpaid charges, and minus a reasonable administrative fee, i.e., the lesser of 5 per cent of the charges, or $100.

The "fair and equitable" refund policy provision was made binding on institutions immediately upon enactment of the 1992 Reauthorization Act on July 23, 1992, but, as of one year after the effective date, no definitive guidance has been forthcoming from the Department concerning the implementation of this Congressional mandate. Among the many difficult questions raised by this requirement are the following: May an institution have separate refund policies for Title IV recipients and non-Title IV recipients? How does an institution cope with competing demands for refunds, for example, between Federal, state and private aid programs? Since pro rata calculation depends on knowing the last day of a student's attendance, will institutions be required to take daily class attendance for Title IV recipients? How does an institution define "period for which the student has been charged," and does this include orientation, term breaks and holiday periods?

This is but one example of the many issues resulting from the 1992 Reauthorization Act which remain unclear and for which insufficient guidance has been provided, even though compliance has already been mandated by Congress. This example also underscores the esoteric and detailed nature of the Federal student aid programs, and the potential exposure an institution can have in attempting to act in full compliance with the law.

Conclusion and Recommendations: A Preventive Approach

Given the significance and complexity (both procedural and substantive) of the Federal student aid programs reviewed in this pamphlet, it is strongly recommended that institutions develop and follow an approach that is fundamentally preventive rather than reactive. How such preventive law and administration is practiced will vary from institution to institution, but several key points are suggested for consideration:

(1) Devote sufficient resources, in terms of personnel, computer capability and administrative oversight, to ensure that the Federal studen' aid programs are managed properly on a current basis.

(2) Have a plan for evaluating institutional operations periodically, whether by internal personnel or outside consultants. Discuss with

counsel the advisability of their participating in such reviews as part of a confidential attorney-client review process.

(3) With appropriate involvement of senior administrators and counsel, utilize the required annual audit process to contribute to the institution's ongoing process of self-evaluation.

(4) Prepare for and participate actively in any external review of institutional compliance, including entrance and exit conferences and responding to any program review or audit determination letters. Adhere to ground rules strictly regulating the conditions under which access to institutional personnel and records will be permitted.

(5) Encourage, to the greatest extent feasible, the close collaboration among financial aid, fiscal and legal officers of the institution so that regulatory and statutory developments, and appropriate institutional responses, can have the broadest base of experience and expertise.

A well managed financial aid operation with sufficient resources, periodic self-evaluations, and the coordinated efforts of senior campus administrators and counsel will go a long way toward ensuring that an institution is both fulfilling its legal obligations and protecting itself from financial exposure and other adverse consequences arising out of its administration of the Federal student aid programs.

Reference Materials

1. Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070-1099, *amended by* Higher Education Amendments of 1992, Pub. L. No. 102-325, 461-498, 1992 U.S.C.C.A.N. (106 Stat.) 448, 479-652.

2. Title IV implementing regulations, 34 C.F.R. Pts. 600, 668, 673, 674, 675, 676, 682, 690 and 692.

3. Office of Student Financial Assistance, U.S. Department of Education, *Federal Student Financial Aid Handbook*.

4. Office of Inspector General, U.S. Department of Education, *Audit Guide of Student Financial Assistance Programs* (March 1990), *updated by* Office of Student Financial Assistance, U.S. Department of Education, "Dear Colleague" Letter No. GEN-92-17 (Sept. 1992).

5. National Association of Student Financial Aid Administrators, *Encyclopedia of Student Financial Aid*.

6. National Association of Student Financial Aid Administrators, *Institutional Guide for Financial Aid Self-Evaluation*.

7. Blain B. Butner, "Harsh Realities for Audit and Program Review Appeals," Student Aid Transcript, The Magazine of NASFAA, at 4 (Summer 1989).

8. Blain B. Butner, "Limiting Liability from Program Reviews and Audits," *Student Aid Transcript, The Magazine of NASFAA*, at 12 (Fall 1989).

9. Leslie H. Wiesenfelder, "Institutional Liability for Federal Student Financial Aid," 37 *Federal Bar News & Journal* 612 (Dec. 1990).

10. *Higher Education Amendments of 1992*, H. R. Conf. Rep. No. 630, 102d Cong., 2d Sess. (June 29, 1992).

11. *Higher Education Amendments of 1992, Report of the Committee on Education and Labor*, H.R. Rep. No. 447, 102d Cong., 2d Sess. (Feb. 27, 1992).

12. *Reauthorizing the Higher Education Act of 1965, Report of the Committee on Labor and Human Resources, United States Senate*, S. Rep. 204, 102d Cong. 1st Sess. (Nov. 12, 1991).

13. *Potential Government Liability on Loan Guarantee Programs: Hearings Before the Committee on Governmental Affairs*, 101st Cong., 1st Sess. *passim* (June 13, 1989).

14. *Abuses in Federal Student Aid Programs: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 101st Cong., 2d Sess. Parts 1-4 (1990).

15. U.S. General Accounting Office, *Guaranteed Student Loan Programs Need Improvement* (March 1993).

16. U.S. General Accounting Office, *High Risk Series: Guaranteed Student Loans* (Dec. 1992).

17. U.S. General Accounting Office, *Student Loans: Direct Loans Could Save Billions in First 5 Years with Proper Implementation* (Nov. 25, 1992).

18. U.S. General Accounting Office, *Stafford Student Loans: Millions of Dollars in Loans Awarded to Ineligible Borrowers*, at 2, 8 (Dec. 1990).

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